United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19854

Hardie James, et al

Appellants

Vs.

Pennsylvania General Electric Company

Appellee

F 468 A

BRIEF AND JOINT APPENDIX FOR THE APPELLANTS

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BRIEF FOR APPELLANTS

APPENDIX

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether the Court below followed the mandate of this Court in case number 18537 and conducted the hearing upon remand of Civil Action No. 3411-61 in a manner consistent with the opinion of this Court entered June 30, 1965, or

2. Whether, in an action for declaratory judgment by an insurance company, the insured, a claimant against him, and the driver of his automobile at the time the claim arose, all named in the action as defendants, are entitled to a jury trial, demand for such trial having been made at the time answers were filed, or,

3. Whether the evidence adduced by the insurance company was sufficient to support a finding by the Court below that it had no adequate legal remedy at the time its action for declaratory judgment was filed.

TABLE OF CASES

TEXTS AND ARTICLES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,634

Marie Alma James, et al

Appellants

Vs.

Pennsylvania General Insurance Company

Appellee

BRIEF FOR APPELLANTS'

JURISDICTIONAL STATEMENT

The jurisdiction of the Court below was founded upon the "Declaratory Judgment Act," 28 U. S. C. A. 2201 and upon Rule 57 of the Federal Rules of Civil Procedure.

The jurisdiction of this Court is invoked pursuant to the same statute, and pursuant to the Act of October 31, 1951, amending the Judicial Code 65 Stat. 726, 28 U. S. C. A. 1291, the Federal Rules of Civil Procedure, Rule 73, and the District of Columbia Code (1961 Ed., as amended) Title 11, Section 101.

This Court, in case number 18,537, entered an Opinion[1] dated June 30, 1965, in which it remanded for further proceedings before the United States District Court for the District of Columbia a suit for declaratory relief filed by the insurance company in the Lower Court. (Civil Action No. 3411-61). The record of proceedings before the Court below in Civil Action 3411-61 has

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1. Opinion, J. A. "A", Pennsylvania General Insurance Company Vs. James, et al; 349 F2d 225 (C. C. A. D. C., 1965).

been filed as the record of this, the second appeal to this Court. Any reference to the Joint Appendix in this Court's case number 18,537 will be designated "J. A. (No. 18,537)," while references to the Joint Appendix filed herewith will be simply (J. A. --).

Pursuant to the mandate of this Court dated July 16, 1965, the case was remanded "for further proceedings consistent with the Opinion of this Court." Thereafter hearing was held in the lower Court on the 23rd day of September, 1965, and that Court entered its "Findings of Fact" and "Conclusions of Law" on Order on the 7th day of October, 1965.[2]

STATEMENT OF THE CASE

After considering the initial appeal of this case, this Court entered its mandate (J. A. --) record civil action No. 3411-61, entered July 16, 1965) directing the trial Court to conduct "further proceedings consistent with the Opinion of this Court."

In its Opinion (J. A. --) annexed hereto as Appendix "A", 349 F2d 268 dated June 30, 1965, Case No. 18,537) this Court stated:

> Although the foregoing factors support that the Company's legal remedy was adequate and consequently that Appellants demand for a jury trial should have been honored, the parties have never had an opportunity to address themselves to the adequacy of appellee's legal remedy, since the trial judge denied a jury trial without inquiring into that issue. We think that such an opportunity should be afforded now. Factors not presently appearing in the record may exist which demonstrate that delay in adjudicating the fraud issue likely would have prejudiced appellee's case

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2. "Findings of Fact," "Conclusions of Law," J. A. "B".

> seriously. Accordingly, we remand with directions to hold a hearing to determine whether the appellee's legal remedy was adequate at the time this suit was filed, with the contingency of a new trial before a jury to abide the result.

According to the mandate, a hearing was held in the trial Court on September 23, 1965. No witnesses were heard by the Court, which declined a proffer by the appellee here. (J. A. --). (Tr. 10).

On the morning of the hearing, counsel for appellee filed his affidavit and delivered a copy thereof to counsel for appellants. (J. A. --, "Affidavit of William H. Clarke")

This Affidavit of counselfor appellee states in essence that counsel gave appellee his opinion that the action for declaratory relief should be filed: (See also J. A. --, Tr. 11 - 12).

The Affidavit states:

A. "I was of the opinion that there was no legal remedy at law open to the insurance company. The insurance company had not sustained a loss at that time.

I realized that the insurance company had not sustained a loss at that time. I realized that the insurance company would have to sit back and wait until the personal injury action had been resolved one way or another. I also realized that the insurance company was subject to garnishment once the plaintiff recovered a judgment or that the insurance company would be subject to a suit from its own insured if he paid the judgment and sought indemnification from the insurance company."

B. "I also realized that the witness were subject to the infirmities of this world and that they would move about this country, lose their health or life, and be difficult if not impossible to find at the time of trial, and I realized that it was indispensable that I have these witnesses from the insurance company in Philadelphia and at least two witnesses in the District of Columbia. In preparing for trial (sup. supp.) I learned that one witness in the Philadelphia office of the insurance company, Mrs. Dorothy N. Vanell, the most important witness in Philadelphia, had left the employment of the company and it was necessary to have someone appeal to her patriotic sense of duty to come to Washington and testify in this case."

C. "During the course of preparing for trial (emp. supp.) in this case, it became apparent that Mr. Sapourn no longer had his file that contained some valuable papers in it with respect to the notice of premium due and lapse notices sent to Mr. Reeves. Mr. Sapourn claimed that he gave the file to Mr. Fruedig, an insurance company adjuster. At the time of trial Mr. Fruedig was no longer employed by the insurance company but was working locally and was amenable to service of process and did appear in Court....."

D. "A discovery type of deposition was taken of the bank officer of the American Security and Trust Company, and he produced photostats of certain checks held in the bank company's records. The bank officer was specifically asked to retain the checks and bank statements as exhibits in this lawsuit and he promised to do so. However, at trial he could not produce any of the checks or bank statements. Fortunately, in the discovery type deposition taken, photostats of the checks were made by the reporter. These were used in lieu of the originals, and in lieu of the bank's records which are systematically destroyed."

E. "These facts (emp. supp.) point up quite clearly that the longer this type of a lawsuit is allowed to stand around, the less evidence you may expect at trial. I think this is generally the experience of most lawyers in this type of lawsuit...."

The balance of Mr. Clarke's testimony is also devoted to his opinions, conclusions or conjecture.

Based soly on this affidavit, the Court, over the opposition of appellants (J. A. --, Opposition To Proposed Findings of Fact and Conclusions of Law Proposed by Plaintiff," filed October 5, 1965), the Court below, on October 7, 1965, entered the order from which this appeal is taken.

The Court, as set forth in that Order (J. A. --, "Findings of Fact" and "Conclusions of Law,") found as follows:

1. That the cause of action filed herein was a suit in equity and sought equitable relief. Although the suit was filed under the Declaratory Judgment act, the plaintiff could have brought similar action in equity.

2. Delay in presenting the defense fraud would be prejudicial to plaintiff.

3. The plaintiff insurance company did not have an adequate remedy at law at the time the suit was filed.

And, the Court, in that Order, concluded:

"That the defendants were not entitled to a jury trial..."

"ORDERED that the judgment entered for the Plaintiff by Judge Tuttle on the 8th day of January, 1954, be, and it hereby is, reinstated."

STATUTES AND RULES INVOLVED

The Declaratory Judgment Act, 28 U. S. C. A. 2201.

§ Creation of Remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, § 111, 63 Stat. 105.

DECLARATORY JUDGMENTS

Federal Rules of Civil Procedure, Rule 57.

The procedure for obtaining a declaratory judgment pursuant to Title 28 U. S. C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. As amended December 29, 1948, effective October 20, 1949.

STATEMENT OF POINTS

1. The hearing after remand was not a "proceeding" consistent with the opinion of this Court.

2. There was no evidence adduced at the hearing on remand to support a finding that appellee did not have an adequate legal remedy at the time the suit for declaratory judgment was filed.

3. There is no evidence to support the Court's "Findings of Fact" included in the Order from which this appeal is taken.

4. There are no facts upon which the "Conclusions of Law" in the order appealed can be based.

5. The Order appealed dated October 10, 1965, is not supported by evidence and is contrary to law.

6. In accordance with the Opinion of this Court entered upon the initial appeal hereon on June 30, 1965, this case should be remanded for a trial before a jury.

SUMMARY OF ARGUMENT

1. The Court below, after hearing on remand, contrary to the mandate of this Court, decided the question of appellants right to a trial by jury as a matter of law and no evidence was heard, nor any entered to support a finding that the appellee had no adequate legal remedy at the time its suit for declaratory judgment was filed.

ARGUMENT

The Opinion of this Court in its first review of this case (J. A. --, Appendix "A", Jones, et al v Penn. General Ins. Co.) was entered after a studied analysis of controlling cases.

But there is possible merit in appellants' claim that they were erroneously deprived of a jury trial. In providing for declaratory judgments, Congress left unaffected the right to jury trial. Federal Rules of Civil Procedure, Rule 57, Lumberman's Mut. Casualty Co. v Elms and Howard, Inc.; 10 6 F2d 497 (2d Cir. 1953).

The right to a jury trial in a declaratory judgment action depends therefore on whether the action is simply the counterpart of a suit in equity, that is, whether an action in equity could be maintained if declaratory judgment were unavailable - or whether the action is merely an invented law suit. See Pacific Indemnity Co. v McDonald, 107 F2d 146 (9th Cir. 1939) Jones "Right To A Jury Trial In Civil Actions," 72 Yale, L. J. 655,685-86 (1963); Borchard, "Declaratory Judgments," 40Cm. 63 (1941).

The issue tendered by appellee's complaint was fraud in the procurement of the insured's renewal policy. At common law an action to rescind a contract for fraud in the procurement could be maintained in equity only if the wrongs giving rise to the right of rescission could not be adequately presented in defending against a legal action on the contract, (emp. supp.) thus affording an adequate remedy at law.

It is respectfully submitted that the final Court at the remand hearing lacked the studied analysis given the matter of appellants' right to a jury trial given by this Court:

> The Court: But what is there for me to determine? (J. A. -- Tr. 5).
>
> Mr. Clarke: You must determine whether or not we had an adequate remedy at law at the time that we filed a declaratory judgment action.
>
> The Court: What if you had? Suppose I find that you did have one, what would be the consequence of that? Under the present law a declaratory judgment action may be brought even when it is not an exclusive remedy.
>
> Mr. Clarke: Yes.
>
> The Court: I wonder what the Court of Appeals had in mind there. (J. A. --, Tr. 5).

The Court: If they were entitled to a jury trial, then it would be my function, would it, to set aside Judge Tamm's -?

Mr. Clarke: I think it would be your function then to order a new trial.

The Court: Yes, I see.

Mr. Clarke: We feel that a jury trial was not (J. A. --, Tr. 6) called for in this instance.

The Court: I venture to suggest, with all due deference, that that should have been part of the decision of the Court of Appeals.

Mr. Clarke: At the time we filed this declaratory judgment action, we had no loss as such. We had a possibility of loss in the future that might take two years or five years to realize.

The Court: Well, you wouldn't have had a remedy anyway until you were sued.

.....

The Court: The purpose of declaratory judgment actions was to enable earlier determination of these questions. (J. A. --, Tr. 7).

.....

The Court: If it was an action for rescission, then no jury trial was proper?

Mr. Clarke: That is right. It was an equitable action if it was one for rescission. And, we say this is, in effect, what this suit resulted in, Your Honor.

The Court: You contend that the policy was procured by fraud?

Mr. Clarke: And what you, in effect, seek to do is to have it set aside for fraud? (J. A. --, Tr. 9).

.....

Mr. Clarke: ..Now, I have the manager of the insurance company here and I am prepared to take the stand and testify...

The Court: That is a question of law.

Mr. Clarke: Well, I didn't know whether they wanted to take testimony or not, Your Honor.

The Court: Well, I don't know what the Court wanted, but I am not going to take testimony on a question of law. (Emp. supp.) (J. A. —, Tr. 10).

.....

The Court: It seems to me that this was a question of law which the Court of Appeals could have decided, (J. A. —, Tr. 13) but apparently they want this Court to decide the question of law.

Mr. Noble: ...The Court of Appeals said, in effect, if Your Honor please, this case should be remanded and reversed for a new trial before a jury, but, on the other hand, neither party has had an opportunity...to show that it did not have an adequate remedy at law.

The Court: That is not the way I construe the Opinion. I construe this Opinion as remanding this case for a determination by this Court as to whether the action that was brought by the -- the Court did not use this language, but this is the way I construe it -- whether this action is an action in equity, in which there is no right to a jury trial, or whether this is in effect, an action at law, and therefore a jury trial is appropriate....(J. A. --, Tr. 13).

Appellants submit that this Court clearly stated in its Opinion (supra) on the initial appeal here, that the suit filed for declaratory relief was in essence a suit based upon fraud in the procurement of the insurance policy and that such actions, at common law "could be maintained in equity only if the matters giving rise to the right of rescission could not be adequately presented" in defending against a legal action on the contract..."

"For example, if delay in presenting the defense of fraud could be prejudicial..." (J. A. --, "Opinion," Supra).

It is respectfully submitted that this Court remanded this case to determine whether any special circumstances, prevailing at the time the suit for declaratory judgment was filed, were here present. Properly construed, it is submitted, the mandate required the trial court to order a trial by jury unless a showing of such special circumstances were made at the remand hearing.

This Court, quoting from 3 Pomeroy, "Equity Jurisprudence," Section 914a at 590-592 (1941), stated:

> The rule is generally adopted that a suit will not be sustained to cancel an executory, non-negotiable, personal contract, for example, a policy of insurance, when the fraud might be set up as a defense to an action on the contract, and there are no special circumstances which would prevent the defense from being available, adequate and complete...On the other hand, jurisdiction has been exercised to cancel instruments...where delay and other circumstances might ultimately hinder a defense in an action at law. For instance, a right to maintain a suit in equity often arises from the fact that a defense at law in an action on an insurance policy may be lost to an insurer because of uncertainty as to the time when loss may occur, the danger that witnesses may disappear, or because the policy may become incontestable after a limited period unless such a suit is begun by the insurer.

It is here significant, however, that even the "special circumstances" which referred to by Pomeroy, and, indeed by this Court in its Opinion (supra), would not make equitable relief available to one seeking relief on a contract of insurance allegedly procured by fraud, if, as here, an insurance claim had already arisen and a "suit on the policy pending or threatened," (J. A. —, Opinion, page 5).

Thence, it would appear, that even if, arguendo, the Affidavit of William E. Clarke (supra) should here be construed to form a factual basis for a claimed prejudice such as might enable the Court to construe the declaratory relief sought below equitable because of delay involved in presenting fraud as a defense to an action on the insurance policy, nevertheless, since the injury suit was filed by the appellant Dona before the suit for relief was filed, the prejudice required to lend the colour of equity to the suit was not available. (J. A. --, "Opinion," pages 2, 4 and 5, Ecelov v New York Life Ins. Co., 293 U. S. 379 (1935); DiGiovanni v Camden Fire Ins. Assn., 296 U. S. 64 (1935).

This Court said, on the first appeal of this case (J. A. — "Opinion" page 5):

> The adequacy of the Company's legal remedy depends upon the nature of its proof of fraud. For example, it has been held that an insurer in these circumstances could maintain equitable action for rescission where its claim of fraud rested upon the testimony of witnesses not generally available to it and who might have disappeared before a legal action on the policy could be instituted. Massachusetts Bonding and Insurance Co. v Anderegg, supra. Here, however, the alleged fraud is in large part based on documentary proof, such as the insured's premium check. The Company's employees would seem to be generally available to it to show that the check date induced them to delete the "lapsed" notation on the policy. Moreover, the Company could preserve the testimony of its employees by deposition pursuant to Rule 27, Federal Rules of Civil Procedure. Finally, this suit was instituted when it was known that the pending lawsuit to establish a loss would likely come to trial in about a year.

As a matter of record, the suit for declaratory relief came to trial on December 4, 1963 (J. A., Case No. 18,537, Page 2) or only ten months before the personal injury suit began on October 7, 1964 (Civil Action No. 3174-60, United States District Court for the District of Columbia.)

In all events, it is clear that this Court required a showing of some special circumstance, existing at the time the declaratory judgment suit was filed, to be made at a hearing pursuant to its mandate on the initial appeal of this case. There was no such showing. Assuming, again arguendo, that the Court required nothing more than an affidavit of counsel setting forth his opinions and would deny to appellants a right to cross examine, nevertheless the alleged "facts" upon which Mr. Clarke's opinions set forth in his affidavit (supra) have already been disproved by this Court in its Opinion as insufficient ("Opinion" quoted above, page 5). There is no showing that witnesses called to testify at

the trial of the declaratory action would not have been available ten months later or at a time subsequent to the trial of the injury action when action on the judgment might have been instituted against appellee insurer. It is obvious from the earlier Opinion of this Court in this matter and from the cases so succinctly set forth therein, that something far more than a mere opinion of counsel based upon generally accepted hazards of modern trial was required by the mandate of this Court in Case No. 18,537, if appellants are to be denied their right to a jury trial in this action commenced long after a suit for personal injuries had been filed.

That the Court below misconstrued this Court's mandate is manifest in its colloquy with counsel at the remand hearing.

> The Court: But either way I think we all reach the same end. I have to decide now, do I not, as to whether (J. A. --, Tr. 14) this was a jury action or a non-jury action?
>
> Mr. Noble: That is the broad question, Your Honor, and if my understanding of the Court of Appeals opinion is correct, your determination under the opinion of that question will rest on whether or not the insurance company had an adequate remedy at law at the time ----
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> The Court: I am not going to limit myself to that. You know the defense of adequate remedy at law no longer exists, anyway, under the new procedure.
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> .....
>
> The Court: I think I have to determine whether this was an action on equity or an action at law. I don't think that the Court of Appeals would have remanded the case for a hearing in this Court on such a narrow point as you suggest. I think it would have decided it itself. (J. A. --, Tr. 15).

Immediately upon conclusion of the argument at the remand hearing during which no evidence of "special circumstances" was adduced, other than the affidavit of counsel for appellee, which was, naturally, not subject to cross examination, the Court rendered its "Opinion" from the bench. (J. A. --, Tr. 25 - 28).

The basic question is whether this action is a jury action or a non-jury action. The fact that it seeks a declaratory judgment is not determinative of that question...

It is the view of this Court that the test is what would have been the plaintiff's remedy before the Declaratory Judgment Statute was passed.....

This action is, in effect, a suit to rescind or cancel a contract on the ground of fraud. If, instead of bringing an action for declaratory judgment, the Plaintiff had brought an action for recession and cancellation, there would have been maintained.... (J. A. --, Tr. 25) (Emp. supp.).

The Court is of the opinion that, in effect, this is an action to set aside a contract for fraud and that such an action could have been maintained even in the absence of a Declaratory Judgment Statute. It would seem to follow, therefore, that this action is a non-jury action, being an action in equity, and the parties are not entitled to a jury trial.

To look at this matter from a different approach, to be sure, the insurance company could have waited until the personal action against the alleged insured was terminated by judgment. If judgment went in favor of the plaintiff in that action, then one of two things might have happened that would have affected the insurance company: The insured, the defendant in the personal injury action could have sued the insurance company on the policy, to require indemnity, or the successful plaintiff in the personal injury action would have started an attachment or a garnishment proceeding as against the insurance company.....In either one of these proceedings, to be sure, the defendant could have set up the defense of fraud, but that remedy did not exist and would not have existed until and unless the proceedings to which I have just adverted, would have eventuated. (emp. supp.)

Consequently, at the time suit was brought by the insurance company, it had no adequate remedy at law. (emp. supp.) Prior to the Declaratory Judgment Statute, it could have brought an action for recession and it would have been a valid defense to say to the insurance company wait until you are sued on the policy by way of a garnishment proceeding or by way of an action for indemnity. Equity invariably took cognizance of actions to rescind or set aside a document for fraud.

The Court therefore reaches the conclusion, first, that the present action would have been an action in equity prior to the enactment of the Declaratory Judgment Statute, and therefore the action for a declaratory judgment is not triable by a jury; second, that at the time this action was brought, the insurance company had no adequate remedy at law. (J. A. --, Tr. 27).

It is clear from the above that the Court below did not pursue the mandate of this Court. It entered no findings in its opinion from the bench, it did not even make reference to the Affidavit of William H. Clarke, which is the only possible thing that occurred at the hearing that could conceivably have been construed as the basis for a determination that special circumstances existed at the time the declaratory judgment suit was filed such as would have justified the denial of a jury trial.

It is quite obvious that the Court decided the question as a matter of law, which indeed, either Court could have done in the initial appeal, had there been a sufficient basis in the record for doing so.

But this Court did not remand this case in the first instance for the determination of a purely legal question. It remanded because "Although the foregoing factors, (Opinion, pages 5 and 6, Case No. 18,537) suggest that the Company's remedy was adequate, and consequently that appellants' demand for a jury trial should have been honored, the parties have never had an opportunity to address themselves to the adequacy of appellee's legal remedy...Facts not presently appearing in the record may exist which demonstrate that delay in adjudicating the fraud issue likely would have prejudiced appellee's case seriously." (emp. supp.)

The Court refused to consider such facts material to its ruling, no such facts were adduced and since the hearing was provided to afford appellee that opportunity, and the "facts" set forth in the affidavit submitted to the Court sans opportunity to submit counter affidavit, is replete with opinions of counsel, and facts that have already been disposed of by this Court (Opinion, supra) as insufficient to justify denial

of a jury trial to appellants, the case should now be remanded by this Court for a jury trial.

CONCLUSION

Wherefore, appellants pray that the Court remand the case to the trial court for re-trial before a jury.

Respectfully submitted,

P. Paul Koble
Attorney for Appellant Dona

INDEX TO JOINT APPENDIX

JOINT APPENDIX "A"

349 F2d 228

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18537

MARIE ALMA JAMES, ET AL., APPELLANTS

v.

PENNSYLVANIA GENERAL INSURANCE COMPANY, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 30, 1965

Mr. B. Paul Noble for appellant Dona.

Mr. Jack A. Hillman for appellants James and Reeves.

Mr. William H. Clarke, with whom *Messrs. Richard W. Galiher, William E. Stewart, Jr.*, and *John H. Verchot* were on the brief, for appellee.

Before BAZELON, *Chief Judge*, and WASHINGTON and DANAHER, *Circuit Judges*.

BAZELON, *Chief Judge*: Appellee Pennsylvania General Insurance Company sought a declaratory judgment that it was not liable to appellants under an automobile liability insurance policy. The policy's stated expiration date was July 14, 1960. Although the Company indicated that

Appendix "A"

a 21-day grace period would be allowed for renewal, it received nothing from the insured until August 28 or 29, 1960, when it received by mail a renewal application together with a premium check dated July 16, 1960. The Company's employees then deleted the "lapsed" notation that had been placed on the insured's policy and cashed his check.

After expiration of the grace period but prior to appellee's receipt of the insured's renewal application, the insured's automobile was involved in an accident in which serious personal injuries were sustained. The Company initially undertook defense of the lawsuit arising out of the accident, but only after first notifying the insured that it was acting without prejudice to a later denial of coverage. Approximately a year before the lawsuit came to trial, the Company withdrew and instituted this suit. Despite appellants' timely demand for a jury trial, the court heard this case without a jury and held for the Company. The court found that the insured had pre-dated his premium check for the purpose of deceiving appellee into treating the renewal application as if it had been mailed during the grace period, when in fact it had not.

On this appeal we reject appellants' contentions that they proved a valid renewal of the insured's policy as a matter of law, and alternatively that the Company waived any right to object to the renewal's validity.[1] Nor can we

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[1] Appellants' waiver argument is based on the trial court's finding that appellee's agent was notified of the accident prior to the receipt of the insured's renewal application. Since the trial court held that by falsely pre-dating his check, the insured intentionally induced appellee to consider his renewal application as if made within the grace period, it is irrelevant whether appellee had imputed knowledge of the accident at the time it struck the "lapsed" notation from insured's policy. See generally 3 POMEROY, EQUITY JURISPRUDENCE §876 *et seq.* (5th ed. 1941). Appellants might

accept their contention that by originally undertaking defense of the lawsuit arising out of the accident, the Company estopped itself from later denying coverage. In the absence of a showing of prejudice by appellants, the Company's prompt notification to the insured that it was defending the lawsuit without prejudice to a later denial of coverage was sufficient to prevent estoppel. See *Fisher* v. *Firemen's Fund Indemnity Co.*, 244 F.2d 194, 196 (10th Cir. 1957).

But there is possible merit in appellants' claim that they were erroneously deprived of a jury trial. In providing for declaratory judgments, Congress left unaffected the right to jury trial. Rule 57, FED.R.CIV.P.; *Lumberman's Mut. Casualty Co.* v. *Timms & Howard, Inc.*, 108 F.2d 497 (2d Cir. 1939). The right to jury trial in a declaratory judgment action depends, therefore, on whether the action is simply the counterpart of a suit in equity—that is, whether an action in equity could be maintained if declaratory judgment were unavailable—or whether the action is merely an inverted law suit. See *Pacific Indemnity Co.* v. *McDonald*, 107 F.2d 446 (9th Cir. 1939); James, *Right to a Jury Trial in Civil Actions*, 72 YALE L. J. 655, 685-86 (1963); BORCHARD, DECLARATORY JUDGMENTS 400 n. 63 (1941).

The issue tendered by appellee's complaint was fraud in the procurement of the insured's renewed policy.[2] At com-

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argue that in view of the Company's imputed knowledge of the intervening accident, it was not justified in relying on the veracity of the date on the insured's check without first having conducted an independent investigation. See *id.* at §891. Appellants have not made that argument in either court, however, and we are not inclined to consider it initially at this time.

[2] The trial court's memorandum opinion indicates it considered the issue to be one of acceptance of the insured's

non law an action to rescind a contract for fraud in the procurement could be maintained in equity only if the matters giving rise to the right of recision could not be adequately presented in defending against a legal action on the contract, thus affording no adequate remedy at law. For example, if delay in presenting the defense of fraud would be prejudicial, the party asserting the defense was permitted to bring an action in equity rather than awaiting a legal action on the contract.[3] But no such

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offer to renew his policy. The trial court apparently reasoned that because the insured intentionally deceived the Company into treating his renewal application as if made during the grace period, the striking of the "lapsed" notation from the insured's policy and the cashing of his check did not constitute a valid acceptance. The Company's prompt disclaimer upon learning the true facts was therefore viewed as an effective rejection of the offer to renew. Although the same facts need be established to sustain either theory of the Company's cause of action, we think the issue is properly viewed as one of fraud. Ordinarily, striking the "lapsed" notation and cashing the check would constitute an acceptance of the offer to renew. The insured's misrepresentation of the check date, like fraudulent misrepresentations in an application concerning age, principal place of garaging, etc., does not convert the otherwise valid acceptance into a non-acceptance. See, *e.g.*, *Massachusetts Bonding & Ins. Co.* v. *Anderegg*, 83 F.2d 622 (9th Cir. 1936).

3 "The rule is generally adopted that a suit will not be sustained to cancel an executory, non-negotiable, personal contract,—for example, a policy of insurance,—when the fraud might be set up as a defense to an action on the contract, and there are no special circumstances which would prevent the defense from being available, adequate, and complete. . . . On the other hand jurisdiction has been exercised to cancel instruments, although not negotiable, where delay and other circumstances might ultimately hinder a defense in an action at law. For instance, a right to maintain a suit in equity often arises from the fact that a defense at

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prejudice was deemed to occur where an insurance claim had already arisen and a suit on the policy was pending or threatened. *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379 (1935); *DiGiovanni* v. *Camden Fire Ins. Ass'n*, 296 U.S. 64 (1935).

When the Company initiated this suit, the loss under the policy had not been established, but an action was then pending in which the loss was subsequently established. The adequacy of the Company's legal remedy depends upon the nature of its proof of fraud. For example, it has been held that an insurer in these circumstances could maintain an equitable action for recision where its claim of fraud rested on the testimony of witnesses not generally available to it and who might have disappeared before a legal action on the policy could or would be instituted. *Massachusetts Bonding & Ins. Co.* v. *Anderegg, supra.*[4] Here, however, the alleged fraud is

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law in an action on an insurance policy may be lost to the insurer because of uncertainty as to the time when loss may occur, the danger that witnesses may disappear, or because the policy may become incontestable after a limited period unless such a suit is begun by the insurer." 3 POMEROY, EQUITY JURISPRUDENCE §914a, at 590-92 (1941).

Compare American Life Ins. Co. v. *Stewart*, 300 U.S. 203 (1937), *with Prudential Ins. Co.* v. *Saxe*, 77 U.S.App.D.C. 144, 134 F.2d 16 (1943).

[4] We think *State Farm Mutual Auto Ins. Co.* v. *Mossey*, 195 F.2d 56 (7th Cir.) *cert. denied*, 344 U.S. 869 (1952), upon which the Company relies, is unsound to the extent that it may be read to uphold denial of a jury trial wherever no loss under the insurance policy has been sustained. The court there upheld denial of a jury trial, although the insurer's claim of fraud was based entirely on documentary proof. Not only is that view inconsistent with past cases, but it would tend to induce insureds to compromise damage claims unfavorably in order to win the proverbial "race to the courthouse door."

in large part based on documentary proof, such as the insured's premium check. The Company's employees would seem to be generally available to it to show that the check date induced them to delete the "lapsed" notation on the policy. Moreover, the Company could preserve the testimony of its employees by deposition pursuant to Rule 27, Fed.R.Civ.P. Finally, this suit was instituted when it was known that the pending lawsuit to establish a loss would likely come to trial in about a year.[5]

Although the foregoing factors suggest that the Company's legal remedy was adequate, and consequently that appellants' demand for a jury trial should have been honored, the parties have never had an opportunity to address themselves to the adequacy of appellee's legal remedy, since the trial judge denied a jury trial without inquiring into that issue. We think that such an opportunity should be afforded now. Factors not presently appearing in the record may exist which demonstrate that delay in adjudicating the fraud issue likely would have prejudiced appellee's case seriously.[6] Accordingly we re-

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[5] Since equity's jurisdiction was determined at common law as of the time an action was filed, the fact that the insured had already sustained a loss on the policy by the time this case was called for trial is irrelevant to the determination of the adequacy of the Company's legal remedy. *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, 215 (1937).

If prior to trial in this case appellants had filed a counterclaim for damages under the policy—as they could have done once the judgment against the insured became final—perhaps they would have been entitled to a jury trial on the fraud issue, which would then have been common to both claims. See *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962). We need not consider the issue, however, since no such counterclaim was filed.

[6] We must reject the suggestion that a judgment n.o.v. would have been required on this record, had a jury found

mand with directions to hold a hearing to determine whether appellee's legal remedy was adequate at the time this suit was filed, with the contingency of a new trial before a jury to abide the result.

So ordered.

DANAHER, *Circuit Judge,* dissenting: The appellee had issued to Donald E. Reeves an automobile liability policy for a period of six months from January 14, 1960 to July 14, 1960. On August 18, 1960, one Marie Alma James, while driving the Reeves car, was involved in an accident in which one Mary Dona was injured. The latter sued Reeves and James alleging negligence. Appellant on October 17, 1961 instituted an action seeking a declaratory judgment which, after full trial before a District Judge sitting without a jury, resulted in an order that the appellee "is not liable to the Defendant Reeves on account of the claims of the Defendants James and Dona based upon an accident which occurred on August 18, 1960"; and further, that the appellee "is not liable to the Defendant Reeves on account of any claim or claims" which occurred after the termination of the policy on or about July 14, 1960.

Reeves and James in their answers had demanded a trial by jury. When the case was called on December 4, 1963, counsel for Reeves and James informed the judge:

> "It was just called to my attention *late yesterday afternoon* that Your Honor is sitting without a jury in this matter.
>
> "The Court: This case has been *on the non-jury*

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for appellants, since the principal issue for the jury would have been appellants' credibility.

calendar since the time it was filed. When was the demand for jury trial filed?

"Mr. Hillman: With the filing of the answer, Your Honor [which had been filed November 13, 1961]." (Emphasis added.)

The trial judge ruled that the relief herein sought was equitable[1] in nature and, of course, under Rule 57 he was authorized to proceed with speedy hearing of an action for declaratory judgment. Jury trial was denied. It is for the court to say whether the action is legal or equitable.[2] I think the trial judge here correctly perceived that the underlying issue was equitable in nature. In that context, and for further background, we may turn to the memorandum opinion of the trial judge. After a full trial he decided basically that the appellee was entitled to a judgment declaring that the insurer was not liable under the policy issued January 14, 1960. He predicated his ultimate judgment, he said, upon the factual situation developed at the trial "plus the Court's evaluation of the credibility of the witnesses." He wrote further:

> "The Court finds the testimony of the defendant Reeves that he mailed the check =2013 on July 16th absolutely untrue and a calculated falsehood. The Court further finds the testimony of the defendant Reeves as incredible and incredulous, insofar as it relates to his accounts with reference to this insurance policy and his contacts with the selling agent Sapourn.

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[1] FED. R. CIV. P. 38 preserves the right of trial by jury, but only with respect to "any issue *triable of right by a jury.*" FED. R. CIV. P. 39 provides that when a jury demand shall have been filed, the trial shall be by jury unless the parties waive or *unless "the court* upon motion or *of its own initiative finds that a right of trial by jury . . . does not exist . . . ."* (Emphasis herein added.)

[2] State Farm Mut. Auto. Ins. Co. v. Mossey, 195 F.2d 56, 59 (7 Cir.), *cert. denied*, 344 U.S. 869 (1952).

"The Court finds in favor of the plaintiff [appellee] in this case. The Court finds that the policy had lapsed prior to the time that the defendant Reeves mailed a check in payment of the renewal premium. The Court finds as a matter of law that the reporting of the accident to a clerical employee of an insurance agent's office in the District of Columbia more than a month after the lapsing of the policy did not, by the acceptance of that report, revive or reinstate the insurance policy. The Court finds that the mailing by the defendant Reeves of a falsely-dated check in the latter part of August and the acceptance of that check by Philadelphia clerical employees of the plaintiff company without knowledge of the accident did not revive or reinstate the policy. The Court finds that the action of the plaintiff in returning a check in the amount of defendant Reeves' misdated check to their Washington attorneys for delivery to the defendant Reeves as soon as the plaintiff company had full knowledge of the facts in this situation was a valid and proper rejection of the defendant's attempted fraudulent renewal of the policy. The Court finds that under the circumstances of this case the plaintiff is entitled to judgment declaring its nonliability under the policy issued on January 14, 1960, which policy the Court finds was never renewed by the plaintiff."

Reeves had so dated his check as to represent to the company that on that date he had signed and mailed a check in the amount of the premium, as the trier found. Actually, the check had been falsely dated and transmitted by Reeves, knowingly, willfully and after the 20-day grace period had expired. He had returned with the falsely dated check, the renewal notice which the company had sent to him. Seldom do we see a more palpable effort to perpetrate fraud.[3]

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[3] Discernible from the court's opinion are findings of the six essential elements giving rise to a claim for misrepresentation. POMEROY, EQUITY JURISPRUDENCE § 876 (5th ed. 1941).

Granting that the opinion otherwise discursively touches upon points stressed by opposing counsel before the judge, it is equally obvious from this record that the carrier rescinded and disavowed upon learning of the fraud which had been practiced upon it. This was not a case where the carrier was bound to sit back and await a possible action on the policy by the insured after the injured passenger, Mary Dona, at some future date might have secured a judgment in her negligence action. Here no loss had been established and no counterclaim based thereon had been filed. Rather, when the appellee elected to rescind, the carrier's rights here could be finally determined in a single equitable action, as was true prior to the adoption of the Declaratory Judgment Act. And certainly thereafter such a suit because of fraud, was permitted where the carrier proved it was entitled to rescind the contract.[4] The insured was entitled to a judgment which fixed the rights and obligations of the parties to that contract.

Here there was not only substantial evidence of actual fraud, as the trial judge found, but the Reeves testimony to the contrary was described as "incredible." The judge specifically noted that the Reeves testimony that the alleged renewal check had been mailed on July 16, was "absolutely untrue and a calculated falsehood." Overwhelmingly the appellee had sustained its burden of proof[5]; indeed we have before us no slightest showing that the findings of the trial judge are clearly erroneous.[6]

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[4] Cf. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 243 (1937). See 6 MOORE, FEDERAL PRACTICE ¶ 57.19, at 3109-3110 (2d ed. 1953).

[5] 6 MOORE, FEDERAL PRACTICE ¶ 57.31 (2d ed. 1953).

[6] Even if there had been a trial to a jury with a verdict for James, in the light of the findings and on the record before us, the trial judge would have been bound to grant a judgment for the insurer, n.o.v. Cf. Pittman v. West American Insurance Company, 299 F.2d 405, 409 (8 Cir. 1962).

On the one hand the appellants tendered the argument that the policy had never been cancelled, and at the same time if cancelled, that it had been reinstated. They contended that the insurer was bound to defend both Reeves and James.

In those circumstances there was open to the insurer no adequate remedy at law if indeed the policy had been procured by fraud. The Company's recourse to equity was proper for no loss had occurred in that liability had not been established against the insured.[7] In this case there was no counterclaim[8] presenting legal issues before the court. At the stage here reached and under the circumstances, the insurer was not bound, as respected authority demonstrates, to sit back, await the pleasure of the claimant, and then raise by way of defense pleading and proof, the very grounds upon which the policy was to be deemed void and of no effect.[9] The insurer here had clearly established that its remedy at law would be ineffective.

The insurer thus was entitled to be relieved of uncer-

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[7] Cf. Zipperer v. State Farm Mut. Auto. Ins. Co., 254 F.2d 853, 856 (5 Cir. 1958).

[8] In Beacon Theatres v. Westover, 359 U.S. 500 (1959), a separate trial of issues under Rule 42(b) or Rule 57 was deemed improper where it might deprive the defendant of a jury trial of issues which had been established in the counterclaim.

[9] As was observed by Mr. Justice Cardozo, writing for a unanimous Court:

> "Here the insurer had no remedy at law at all except at the pleasure of an adversary. There was neither equality in efficiency nor equality in certainty nor equality in promptness. 'The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.' [Citations omitted.]" Amer. Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937).

tainty as to whether or when a loss might later occur; as to the possibility that witnesses and evidence essential to its proof of fraud might disappear; as to the obligation asserted against it involving the expense of investigation and defense of a suit and the maintenance of a reserve against the contingency of recovery.[10] Clearly, the fraud, if and when established, would vitiate the contract and relieve the insurer of possible liability thereunder.[11]

The trial court correctly discerned that equitable considerations required the declaratory judgment that no liability inured in a contract properly cancelled for fraud. I would affirm.

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[10] Massachusetts Bonding & Ins. Co. v. Anderegg, 83 F.2d 622, 624, 625 (9 Cir. 1936).

[11] *Id.* at 625; State Farm Mut. Auto. Ins. Co. v. Mossey, *supra* note 2.

JOINT APPENDIX "B"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA CLINICAL INSURANCE CO.,	)	
Plaintiff	)	Civil Action No. 3411-61
vs.	)	
David Jones, et al.,	)	
Defendants	)	

The United States Court of Appeals for the District of Columbia Circuit remanded this case in its Opinion No. 18117, dated June 20, 1963, to this Court for further hearing. The hearing was held on September 23, 1963, and a memorandum prepared by counsel for the plaintiff, together with an affidavit, was submitted and arguments were heard, and the Court makes the following:

FINDINGS OF FACT

1. That the cause of action filed herein was a suit in equity and sought equitable relief. Although the suit was filed under the declaratory judgment act, the plaintiff could have brought a similar action in equity.

2. Delay in preserving the defense fund would be prejudicial to the plaintiff.

3. The plaintiff insurance company did not have an adequate remedy at law at the time the suit was filed.

The Court makes the following

CONCLUSION OF LAW

That the defendants were not entitled to a jury trial; and it is by the Court this _____ day of _____, 1963,

ORDERED that the judgment entered for the plaintiffs by Judge Youngdahl on the 6th day of January, 1961, be and it hereby is reinstated.

_____
J U D G E

Copy mailed this _____ day of _____, 1963, to Jack A. Gilman, Esq. Madison Building, Washington, D.C., and D. Paul Noble, Esq., 2022 R Street, N.W., Washington, D.C.

GILMAN, STEWART & CLARK

_____
William H. CLARK
Attorney for Plaintiff
1701 - 19th Street, N.W.

JOINT APPENDIX "C"

United States District Court
for the
District of Columbia

PENNSYLVANIA GENERAL INSURANCE CO.,

Plaintiff,

vs.

MARIE ALMA JAMES, ET AL,

Defendants.

Civil Action 3411-61

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Prepared for: Mr Noble.

Vol: 1

PAGES: 1 - 28

DATE: September 23, 1965

GERALD NEVITT
Official Reporter

U. S. Court House
Washington 1, D. C.

STerling 3-5700
Extension 274

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA GENERAL INSURANCE COMPANY, Plaintiff, vs. MARIE ALMA JAMES, et al, Defendants.	Civil Action 3411-61

Washington, D. C.

September 23, 1965.

The above cause came on for hearing of motion before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

Appearances:

For the Plaintiff:

WILLIAM H. CLARKE, ESQ.

For Defendants James and Reeves:

JACK A. HILLMAN, ESQ.

For Defendant Dona:

B. PAUL NOBLE, ESQ.

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P R O C E E D I N G S

THE DEPUTY CLERK: Pennsylvania General Insurance Co. vs. James.

MR. CLARKE: Your Honor, my name is William H. Clarke. I represent the Pennsylvania General Insurance Co. May I take a moment and briefly relate the facts leading up --

THE COURT: First tell me what you are asking this Court to do, what the question is that I have to decide. It would be easier for me to follow you then.

MR. CLARKE: Thank you, sir.

The Court of Appeals has remanded the case with directions to this Court to hold a hearing to determine whether or not appellee's legal remedy was adequate at the time a certain suit was filed in this Court.

THE COURT: I see. Very well.

MR. CLARKE: Your Honor, this results from an automobile accident. A passenger in the automobile was injured and filed a suit in this Court against the operator and against the owner, and the Pennsylvania General Insurance Co. defended that suit, after having first given notice that it might withdraw because it did not know whether or not it had coverage.

The insurance company did withdraw from the suit

and then filed a declaratory judgment action in this Court against the owner, the operator and the injured party. That suit sought to have determined the rights and obligations of the insurance company.

The trial was held before Judge Tamm. At the beginning of that trial the defendants called to the attention of Judge Tamm that they had filed a prayer asking for a jury trial.

THE COURT: Perhaps I didn't follow you closely. What was involved in the trial before Judge Tamm? Was it the original personal injury action?

MR. CLARKE: No, sir, the declaratory judgment action.

THE COURT: Brought by the insurance company?

MR. CLARKE: Yes, sir. Judge Tamm denied the defendants their jury demand and went on and heard the case, found in favor of the insurance company, wrote a memorandum opinion which is in the file before Your Honor, made findings of fact, and then the case went up on appeal.

On appeal, which was decided June 30, 1965, the Appellate Court remanded for a hearing before this Court, and several issues are to come before this Court on hearing. Would you like for me to outline those issues, Your Honor?

THE COURT: Well, proceed in your own way.

MR. CLARKE: Page 3 of the opinion states:

"The right to jury trial in a declaratory judgment action depends, therefore, on whether the action is simply the counterpart of a suit in equity--that is, whether an action in equity could be maintained if declaratory judgment were unavailable--or whether the action is merely an inverted law suit."

That was one of the points raised by the Court of Appeals. And they point out on page 4 that if the delay in presenting the defense at law would be prejudicial to the insurance company, then they may bring an action in equity.

There was a further question raised --

THE COURT: An action for declaratory judgment is not necessarily an action in equity.

MR. CLARKE: No, Your Honor, it is not.

THE COURT: It may be.

MR. CLARKE: It may be.

We think that this action is an action in equity, to determine rights. It is similar to an action for rescission of a contract.

THE COURT: What was the basis on which the

insurance company claimed it was not liable?

MR. CLARKE: Because of fraud.

THE COURT: In obtaining the insurance policy?

MR. CLARKE: Yes, sir. The check was mailed in a week or ten days or a month after the policy had lapsed and after an intervening accident had occurred, Your Honor.

The question before Judge Tamm was whether or not fraud had been committed and whether or not the policy was still in force or whether it had been rescinded or whether it was ever in force.

Now, Your Honor, I have submitted a memorandum in support of the hearing --

THE COURT: But what is there for me to determine?

MR. CLARKE: You must determine whether or not we had an adequate remedy at law at the time that we filed a declaratory judgment action.

THE COURT: What if you had? Suppose I find that you did have one, what would be the consequence of that? Under the present law a declaratory judgment action may be brought even when it is not an exclusive remedy.

MR. CLARKE: Yes, sir.

THE COURT: I wonder what the Court of Appeals had in mind there.

MR. CLARKE: Well, this opinion is hard to understand. There is a dissent that surely spells it out clearly. The Court of Appeals says that if we had an adequate remedy at law, that it was then a law suit, they would consider it like a law suit instead of an equity suit, and that the defendant would be entitled to a jury trial if that were the case.

THE COURT: In other words, do I have to determine whether in this case the defendant was entitled to a jury trial or whether it should be tried by the Court without a jury?

MR. CLARKE: Yes, sir.

THE COURT: If the parties were not entitled to a jury trial, then Judge Tamm's judgment would stand, is that it?

MR. CLARKE: Yes, sir.

THE COURT: If they were entitled to a jury trial, then it would be my function, would it, to set aside Judge Tamm's --

MR. CLARKE: I think it would be your function then to order a new trial.

THE COURT: Yes, I see.

MR. CLARKE: We feel that a jury trial was not

called for in this instance.

THE COURT: I venture to suggest, with all due deference, that that should have been part of the decision of the Court of Appeals.

MR. CLARKE: Well, we think the dissent did decide that.

THE COURT: Is that what the dissent says?

MR. CLARKE: The dissent by Judge Danaher points out quite clearly that the relief sought was equitable in nature and that the Judge was authorized to proceed with the hearing and that it was up to the Court to say whether the action was legal or equitable, and he went on to point out that we had no remedy at law.

At the time we filed this declaratory judgment action we had no loss as such. We had a possibility of a loss in the future that might take two years or five years to materialize.

THE COURT: Well, you wouldn't have had a remedy, anyway, until you were sued.

MR. CLARKE: That is right, sir.

THE COURT: The purpose of declaratory judgment actions was to enable earlier determination of those questions.

MR. CLARKE: That is right, sir.

THE COURT: But that does not rule the question as to whether a jury trial was appropriate or not.

MR. CLARKE: That is right. It has to be a suit in equity for the Court to try the case without a jury once a demand has been made. Once a jury demand has been made it has to be a jury trial unless it is an equitable case.

THE COURT: On what theory do you claim this is a suit in equity and therefore a jury trial is not appropriate?

MR. CLARKE: We have several different theories. Principally this, Your Honor, that the suit reads, both the complaint and the answer read as if it were equiteble. We point out to Your Honor that we didn't use the words rescind the contract or rescission of a contract, but we asked that rights be determined, as distinguished from a money judgment or damages.

We find a good many of these cases now brought on by the various elements suing in the south to desegregate school boards and school members, and they frequently say they are coming in only for determination of rights, as distinguished from money or damages.

And our suit was based on this determination of rights. Although we did not use the word rescission or rescind, in effect the Court treated this as a case for

rescission of a contract.

THE COURT: If it was an action for rescission, then no jury trial was proper.

MR. CLARKE: That is right. It was an equitable action if it was one for rescission. And we say this is, in effect, what this suit resulted in, Your Honor.

THE COURT: You contend that the policy was procured by fraud?

MR. CLARKE: That is right, yes, sir.

THE COURT: And what you, in effect, seek to do is to have it set aside for fraud?

MR. CLARKE: Yes, sir; or we have it in the alternative, that the policy never existed because fraud induced us to issue it.

Now, there is one further thing that the Court did mention in their opinion that I would like to call to your attention. They bring out the fact, Your Honor, that in the alternative, where you have a suit or a possible claim against you -- I take the word "suit" back; let me say possible claim against you, and you feel that it would be prejudicial for you to wait and just sit back and wait to be sued, that you can then appeal to equity to determine that matter without delay. And we think even if this is held to

be a legal action as distinguished from an equitable action, the fact that we would be prejudiced by having to wait this great length of time at the risk of losing witnesses, at the risk of losing exhibits and at the risk of people's memories failing them, that we could have bright this in equity when we did.

I wish to point out to Your Honor that many of the cases decided in this particular field have been decided on counterclaims that have been filed, and invariably the counterclaims ask for money or they bring legal actions, and that this then entitles them to jury trials. And I point this out as a distinction because this did not happen in this case.

Now, Your Honor, I just don't know how to proceed from here because the Court said that they remanded it with directions to hold a hearing. Now, I have the manager of the insurance company here and I am prepared to take the stand and testify, if necessary, and Mr. Galiher here --

THE COURT: That is a question of law.

MR. CLARKE: Well, I didn't know whether they wanted to take testimony or not, Your Honor.

THE COURT: Well, I don't know what the Court wanted, but I am not going to take testimony on a question of law.

MR. CLARKE: Very well, Your Honor.

THE COURT: That would be stultification.

MR. CLARKE: Well, there are certain facts that are contained in my affidavit that was filed this morning, Your Honor, --

THE COURT: What are the facts?

MR. CLARKE: -- that possibly I should tell you about.

The facts are these. My affidavit is based on the fact that I gave the opinion to the insurance company that this was the way to proceed in this matter rather than sit back and wait for two to five or six years before being served with suit papers.

THE COURT: I don't think that that fact is relevant.

MR. CLARKE: All right. Some of the other facts as contained in my affidavit are as follows: that in the two years between the time that we filed this suit for declaratory judgment and the time that Judge Tamm heard this suit we had two employees of the insurance company who left the employment of the insurance company. One of them was locally employed and I was able to subpoena him. The other was a young lady from the Philadelphia office, who is a very

vital witness, Your Honor. She had ceased her employment, lived in New Jersey, and we had to really persuade this lady out of justice and fairness to come and testify.

I also want to point out that even in that two year period we lost certain of the insurance agent's files that would have substantiated our story even more. The bank records that we used were destroyed at the time of trial and we had taken the deposition to preserve some of the bank records.

The Court of Appeals decision makes reference to the fact that maybe we would not have to worry about this period of time between the time before we would be sued because our proof was largely documentary. Our proof was not largely documentary; it involved the credibility and the appearance of witnesses, and to further delay them in not being able to testify would have hurt our case.

I feel that a quick trial in the nature of the declaratory judgment was desirable. If we had waited any further we would have lost further witnesses and had a harder time defending a case at law rather than --

THE COURT: The only way the matter could have come on in an action at law would be if there was a judgment against your insured, isn't that so, and then being --

MR. CLARKE: That is right, or then if the party that was injured recovered money and attached us. Then we would be defending a law action, and by that time maybe our proof would have disappeared.

Thank you, Your Honor.

THE COURT: I will hear the other side.

MR. NOBLE: May it please the Court, my name is Ben Paul Noble. I represent one of the defendants in the declaratory judgment action, Mary Dona, who is also an appellant before the Court of Appeals and who was the injured party in the personal injury suit.

If Your Honor please, I really don't understand, and I don't think any of us do, what the Court of Appeals really intended by remanding this case for a hearing before the Court below, especially in light of the manner in which the opinion of the majority of the Court of Appeals was written, in which it clearly set forth all of the grounds -- which, incidentally, merely reaffirmed grounds given in other decisions which were cited before the Court -- why a jury trial should have been granted, and consequently we do not understand why it was remanded for a hearing.

THE COURT: It seems to me that this was a question of law that the Court of Appeals could have decided,

but apparently they want this Court to decide the question of law.

MR. NOBLE: Well, Your Honor, I think the question, as I read the opinion, that was remanded for hearing before the Court is rather limited to this point. The Court of Appeals said, in effect, if Your Honor please, this case should be remanded and reversed for a new trial before a jury, but, on the other hand, neither party has had an opportunity -- and by "neither party" I think expressly was meant the insurance carrier -- an opportunity to show that it did not have an adequate remedy at law.

THE COURT: That is not the way I construe this opinion. I construe this opinion as remanding this case for a determination by this Court as to whether the action that was brought by the -- the Court did not use this language, but this is the way I construe it -- whether this action is an action in equity, in which there is no right to a jury trial, or whether this is, in effect, an action at law and therefore a jury trial is appropriate. But either way --

MR. NOBLE: Your Honor, I would differ to a matter of degree with Your Honor.

THE COURT: But either way I think we all reach the same end. I have to decide now, do I not, as to whether

this was a jury action or a non-jury action?

MR. NOBLE: That is the broad question, Your Honor. And if my understanding of the Court of Appeals opinion is correct, your determination under the opinion of that question will rest on whether or not the insurance company had an adequate remedy at law at the time --

THE COURT: I am not going to limit myself to that. You know, the defense of adequate remedy at law no longer exists, anyway, under the new procedure.

MR. NOBLE: If Your Honor please, then going broadly to the --

THE COURT: I think I have to determine whether this was an action in equity or an action at law.

I don't think that the Court of Appeals would have remanded this case for a hearing in this Court on such a narrow point as you suggest. I think it would have decided it itself.

MR. NOBLE: Well, I will invite Your Honor's attention to page --

THE COURT: I have read the opinion. Suppose you argue the matter from your point of view.

MR. NOBLE: If Your Honor please, the broad question, then, of whether or not the defendants before the

Court in a declaratory judgment action were entitled to a jury trial rests on whether or not at the time the declaratory judgment action was filed the suit was in reality an action at law or an action in equity, irrespective of the fact that it was brought under the declaratory judgment action.

THE COURT: I think that is exactly correct, and I imagine that your adversary would agree to that.

MR. CLARKE: Yes, sir.

MR. NOBLE: The general law, if Your Honor please, is that an action on a policy of insurance, for rescission, will not lie in equity unless there are special circumstances showing why equitable relief should be granted. Rescission will be denied in an action by an insurance carrier for cancellation of a contract on grounds of fraud unless special circumstances indicate that equitable relief under the special circumstances is warranted.

At the time this action was filed in this court, Your Honor, that is, the declaratory judgment action, there had already been pending for more than two years in the court, with the knowledge of the insurance company because Mr. Clarke's firm had entered an appearance and filed answers in it, a personal injury suit against their insured under the disputed contract of insurance.

The declaratory judgment suit came to trial before the Court, speaking through Judge Tamm, less than a year, if Your Honor please, before the personal injury suit actually came to trial, some nine months later, and was decided in favor of the plaintiff Dona.

Now, Your Honor, I mention this because it goes to Mr. Clarke's argument that there were special circumstances, to wit, witnesses who had disappeared or might disappear and whose testimony could not be preserved. As was pointed out by the Court of Appeals, even if the timing had been other than it actually was and the two cases farther apart, than the nine months that they actually were on this court's calendar, the testimony of the witness could have been preserved through deposition. As a matter of fact, I believe the testimony of one of them was.

It should be noted by the Court that both of the witnesses that Mr. Clarke claimed had left the company did appear and testified in the declaratory judgment suit and there is no showing that they would not have been able to have been persuaded to appear and testify some nine months later in the personal injury action.

This is not a case, then, where there was not a case in dispute at the time the declaratory judgment action

was filed or tried. As a matter of fact, the two cases were tried, as it turned out, within the same court year, the personal injury suit being some nine months later than the declaratory judgment action. And the witnesses who were present at the time of the declaratory judgment action we must assume could have been present nine months later, in the absence of any showing that that nine months would have made a difference.

And as was pointed out by the Court of Appeals in its opinion, the question of fraud, which was a matter of defense in an action at law on the policy, would have been a matter of defense in an action at law on the policy and the matter of proof in the declaratory judgment action was in this case largely documentary, going to the date of a check and certain banking practices, along with the practices of the defendant.

A case which decided that there was no prejudice to an insured's company such as would give rise to an equitable action because of special circumstances where the testimony could be preserved and where the nature of the proof involved in a fraud was largely documentary, is the case of Enloe vs. New York Life Insurance Company.

THE COURT: I recall that case very well.

MR. NOBLE: This case held that there is no prejudice where a suit is already filed and an insurance company then seeks to disclaim a jury trial or argue that the insured is not entitled to a jury trial.

If Your Honor please, in effect, this declaratory judgment suit was brought with the parties inverted, raising a question of fraud, which was a matter of defense to the insurance carrier on the contract, and could have been raised at any time within a period of two years after the date it was issued, as a pure matter of defense. Their position was we had no policy of insurance because a renewal premium was predated during the grace period and submitted to us after the accident. This is without going to the question of credibility, which was at issue in the case decided by Judge Tamm. Their position essentially boiled down to that.

This same position could have been urged as a matter of defense to an action on the insurance policy. Thus, the matter raised in pleading by Pennsylvania General in the declaratory judgment action, in effect, raised a legal question which was a matter of defense to the insurance company on the contract. Or, if the declaratory judgment suit had been brought not by the insurance company, under other circumstances, where, for instance, they might never

have entered their appearance in the personal injury suit, but had instead been brought by the insured Reeves, on the same grounds and with essentially the same type complaint that the insurance company brought the declaratory judgment action, then the position being inverted, he would have been entitled to a jury trial, or either party would have, because he would have been alleging a contract and raising -- and they would have had to raise the question of defense of fraud, as a defense; and accordingly, since fraud as a matter of defense, in the absence of special circumstances, is a legal remedy, either party would have been entitled to a jury trial as a matter of right.

If Your Honor please, this will conclude my portion of the argument. I believe Mr. Hillman has a few things to say.

I would like to mention to the Court that I received Mr. Clarke's copy of a memorandum submitted to the Court this morning for the first time, this morning, and an affidavit, and I have had no opportunity to respond to it.

THE COURT: If you had asked for a continuance on that ground I would have continued it.

MR. NOBLE: I am not asking for a continuance, Your Honor, because I believe that if he summarized what he

has put forth in his affidavit, as I believe he has fairly, then he has not in reality shown the kind of special circumstances which would give rise to an action in equity in lieu of an action at law, because there has been no showing, as I understand his recital of what is in the affidavit, that the circumstances changed in the nine month period separating the two trials.

Thank you, Your Honor.

MR. HILLMAN: If Your Honor please, my name is Jack A. Hillman. I am the attorney for defendants Reeves and James.

Your Honor's attention is directed to the complaint filed in the declaratory judgment suit. Paragraph 7 of that complaint states that at the time of the accident complained of there was no insurance on the 1956 Oldsmobile owned by defendant Reeves and driven by defendant James. No where in that complaint is there any allegation that there was insurance. Therefore, there is nothing in the complaint to indicate rescission of anything.

THE COURT: What complaint are you referring to?

MR. HILLMAN: The complaint in the declaratory judgment, this suit before the Court. In effect, the complaint states that we believe, speaking for the insurance

company, that they believe that there is no insurance and they wish the Court to reaffirm that belief of theirs.

However, going on further, Professor Borchard on Declaratory Judgments, at page 400, specifies that there are two issues to be determined, one of which the Court of Appeals has already determined here, and that is whether a jury trial can or cannot be had in declaratory judgments. The second question is, if it can be demanded, must it be granted. Then Professor Borchard goes on further to recite that, for example, the claim of an insurance company -- and this is at page 400 -- for non-liability because of non-coverage of its policy or because the insured breached the contract by failing to give proper notice or to cooperate, involves issues which, if raised in an action by the insured against the company, would have been tried on the law side and would have entitled either party to a trial by jury. This right is not --

THE COURT: What are you reading from?

MR. HILLMAN: I am reading from Borchard on Declaratory Judgments.

This right is not changed by the fact that the company initiates the action for declaration of non-liability

and thus reverses the role of the parties as plaintiff and defendant.

So, in effect, there should not be any change from the equitable side of the court to the legal side depending upon who brings the suit, and Professor Borchard is very explicit on that.

At page 401 he goes on further to state that courts are fortified in using the test of reversing the parties to establish whether an action is legal or equitable -- and all this is with reference to declaratory judgments -- by the correct belief that the declaratory action was not intended to be a means of evading trial by jury or of depriving the insured --

THE COURT: Don't read long extracts, Mr. Hillman.

MR. HILLMAN: Very well, Your Honor.

But basically it doesn't depend upon who initiates the suit.

THE COURT: Of course it doesn't. I think you are quite right, it doesn't depend on who initiates the suit. It depends on the nature of the action.

MR. HILLMAN: In an effort not to reiterate, no where has the plaintiff insurance company asked for rescission, and it is quite evident, at least to me, that they had an

adequate remedy at law. They brought their suit in fraud, deceit and misrepresentation, and especially so that there was no move by the insurance company to strike the demand for the jury trial.

Thank you, Your Honor.

THE COURT: Mr. Clarke, was there no motion to strike a demand for a jury trial?

MR. CLARKE: No, Your Honor.

THE COURT: Why not?

MR. CLARKE: Your Honor, when we came up for trial counsel mentioned it for the first time that they had asked for a jury trial.

THE COURT: You didn't know that there was a demand for a jury trial?

MR. CLARKE: I think I knew it in the beginning, but the clerk had it on the non-jury list and all the cards we got were non-jury.

THE COURT: I see.

MR. CLARKE: And I didn't know that they would make any issue of it.

THE COURT: Well, that answers my question.

Very well, I don't think I need to hear any further from you.

OPINION OF THE COURT

THE COURT: This matter has been very fully and ably argued on both sides.

The basic question is whether this action is a jury action or a non-jury action. The fact that it seeks a declaratory judgment is not determinative of that question. Some actions for a declaratory judgment are, in effect, jury actions, in which a jury trial is the right of either or both parties, while actions for declaratory judgments of other types are, in effect, actions in equity.

It is the view of this Court that the test is what would have been the plaintiff's remedy before the Declaratory Judgment Statute was passed. Was his sole remedy by an action at law, either by an affirmative action at law or by a defense to an action at law, or was he entitled to maintain an action in equity.

This action is, in effect, a suit to rescind or cancel a contract on the ground of fraud. If instead of bringing an action for a declaratory judgment the plaintiff had brought an action for rescission or cancellation, there would have been no doubt that such an action could have been maintained. The mere fact that instead of asking for rescission and instead of entitling this action an action for

rescission the plaintiff asks for a declaration of rights by way of a declaratory judgment and entitles his complaint as an action for declaratory judgment, is not determinative.

The Court is of the opinion that, in effect, this is an action to set aside a contract for fraud and that such an action could have been maintained even in the absence of a Declaratory Judgment Statute. It would seem to follow, therefore, that this action is a non-jury action, being an action in equity, and the parties are not entitled to a jury trial.

It must be noted also that under the present procedure the prayer for relief does not determine the character of the action. The present law is that the plaintiff, if he prevails, is granted such relief as the facts entitle him to, irrespective of the type of relief that he prays for.

To look at this matter from a different approach, to be sure, the insurance company could have waited until the personal injury action against the alleged insured was terminated by judgment. If judgment went in favor of the plaintiff in that action, then one of two things might have happened that would have affected the insurance company: The insured the defendant in the personal injury action, could

have sued the insurance company, on the policy, to require indemnity; or the successful plaintiff in the personal injury action could have started an attachment or a garnishment proceeding as against the insurance company on the ground that it was indebted to the judgment debtor. In either one of those proceedings, to be sure, the defendant could have set up the defense of fraud, but that remedy did not exist and would not have existed until and unless the proceedings to which I have just adverted would have eventuated. Consequently, at the time suit was brought by the insurance company it had no adequate remedy at law. Prior to the Declaratory Judgment Statute it could have brought an action for rescission and it would not have been a valid defense to say to the insurance company wait until you are sued on the policy by way of a garnishment proceeding or by way of an action for indemnity. Equity invariably took cognizance of actions to rescind or set aside a document for fraud.

The Court therefore reaches the conclusion, first, that the present action would have been an action in equity prior to the enactment of the Declaratory Judgment Statute, and therefore the action for a declaratory judgment is not triable by jury; second, that at the time this action was brought the insurance company had no adequate remedy at law.

You may submit an order in compliance with this ruling.

(The hearing stood concluded.)

- - -

REPORTER'S CERTIFICATE

Certified as the official transcript of proceedings.

Official Reporter

JOINT APPENDIX "D"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA GENERAL INSURANCE COMPANY,)

Plaintiff,)

vs.) Civil Action No. 3411-61

MARIE JAMES, et al,)

Defendants.)

A F F I D A V I T

DISTRICT OF COLUMBIA, ss:

I, WILLIAM H. CLARKE, being first duly sworn on oath depose and say that I am the attorney who handled the case of Pennsylvania General Insurance Company vs. James. It was my opinion that a complaint for declaratory judgment should be filed asking the Court to spell out the insurance company's rights for them. I was of the opinion this suit could be tried in a relatively short, period of time, possibly before personal injury action was called for trial.

In making the recommendation, I was of the opinion that there was no legal remedy at law open to the insurance company. The insurance company had not sustained a loss at that time. I realized that the insurance company would have to sit back and wait until the personal injury action had been resolved one way or the other. I also realized that the insurance company was subject to garnishment once the plaintiff recovered a judgment or that the insurance company would be subject to a suit from its own assured if he paid the judgment and sought indemnification from the insurance company.

I also realized that the witnesses were subject to the infirmities of this world and that they could move about this country, lose their health or life and be difficult, if not impossible, to find at the time of trial, and I realized that it was indispensable that I have three witnesses from the insurance company in Philadelphia and at least two witnesses in the District of Columbia. In preparing for trial I learned that one witness in the Philadelphia office of the insurance company, Mrs. Dorothy M. Venell, the

most important witness in Philadelphia, had left the employment of the company and it was necessary to have someone appeal to her patriotic sense of duty to come to Washington and testify in this case.

During the course of preparing for trial in this case, it became apparent that Mr. Sapourn no longer had his file that contained some valuable papers in it with respect to the notice of premiums due and lapse notices sent to Mr. Reeves. Mr. Sapourn claimed that he gave the file to Mr. Fruedig, an insurance company adjuster. At the time of trial, Mr. Fruedig was no longer employed by the insurance company but was working locally and was amenable to service of process and did appear in court, and he testified that he did interview Mr. Sapourn but that he did not take Mr. Sapourn's file with him but rather left it with Mr. Sapourn.

A discovery type of deposition was taken of the bank officer of the American Security and Trust Company, and he produced photostats of certain checks held in the bank company's records. The bank officer was specifically asked to retain the checks and the bank statements as exhibits in this lawsuit and he promised to do so. However, at trial he could not produce any of the checks or bank statements. Fortunately in the discovery type of deposition taken, photostats of the checks were made by the reporter. These were used in lieu of the originals and in lieu of the bank's records which are systematically destroyed.

These facts point up quite clearly that the longer this type of a lawsuit is allowed to stand around, the less evidence you may expect at trial. I think this is generally the experience of most lawyers in this type of lawsuit. This of course enures to the detriment and prejudice of the insurance company and that is possibly why they like to file declaratory judgment actions and have them tried. The issues can be disposed of while the facts are clear in one's mind. In my opinion, if the insurance company had not filed a declaratory judgment action they would have to have waited anywhere from a minimum of a year and a half to two years to a maximum of five or six years to be sued and have their rights determined. During this period of time, it is my understanding the company would have to maintain an active file,

make periodic report on the file, and it is also my understanding that they would have to maintain some sort of a cash reserve fund required by the insurance commissioner of all cases. They would have to pay clerical help and legal help to supervise the file during this time and incur other expenses not known to counsel.

The witnesses called at the time of trial were broken into two groups. The first group were employees of the company from Philadelphia and Washington, and the second group were independent witnesses the insurance company had no control over, such as the bank officer and the important agent witness, Mr. Sapourn. There were twenty some exhibits in this case and it is inconceivable that the case could have been tried on exhibits alone. I think the appearance of Mr. Sapourn as opposed to Mr. Reeves was a very important factor, and I would not feel secure in going forward in this case with just the deposition of Mr. Sapourn unless I absolutely had to, although I realize on paper and in theory this can be done.

_____

WILLIAM H. CLARKE

Subscribed and sworn to before me this _____ day of September, 1965.

_____

Notary Public, D.C.

My commission expires:

_____

19834

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 22 1966

Nathan J. Paulson
CLERK

Addition to Joint Appendix

APPENDIX "E"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA GENERAL INSURANCE COMPANY,)
Plaintiff,)
vs.) Civil Action No. 3411-61
MARIE JAMES, et al,)
Defendants.)

MEMORANDUM IN SUPPORT OF HEARING
SUBMITTED BY PLAINTIFF INSURANCE COMPANY

The Court of Appeals in its Opinion No. 18537, dated June 30, 1965, remanded this case back to the trial court for the purpose of holding a hearing to determine if a jury trial should have been allowed the defendants in this case.

Counsel believes that it was within the discretion of the trial court to deny the defendants' request for a jury trial because the suit as filed by the plaintiffs herein was a suit in equity, and there was no adequate remedy at law available to it when the suit was filed.

1. THE SUIT AS FILED WAS A SUIT IN EQUITY

Suits at common law were filed "in law" or "in equity". Suits filed in law were entitled as a matter of right to jury trial, and equity suits addressed to the conscience of the court were tried by the court. Rule 57 of the Federal Rules of Civil Procedure reserves the right of jury trial to declaratory judgment actions to parties that had that right at common law.

Counsel believes that his suit is one in equity to be heard by the Court alone because (a) the complaint and answer set forth an equitable action when read together; (b) the suit does not seek money damages; (c) there has been no counterclaim filed; and in the alternative (d) it would have been prejudicial to this plaintiff if it had to delay in presenting the defense of fraud, and therefore it should be allowed to bring an action in equity.

A. The present complaint in this action is worded so as to set forth all of the relevant facts material to the issues as to whether or not the

insurance company had a policy of insurance, and the prayers ask that the court determine whether or not the insurance company had any duties to perform. The answer denies the material facts of fraud and misrepresentation and deceit. A reading of the pleadings, complaint and answer, shows that the only relief sought was a "declaration of rights" which is equitable in nature.

Although the complaint and answer did not use the words "rescission" or "rescind a contract", the court in its disposition of the case, and the Court of Appeals have treated this as a case where a policy of insurance was rescinded. The facts clearly show that the insurance policy was issued; it then lapsed for non-payment of premiums; the lapse notice was then stricken from the policy and the policy was reinstated when one of the defendants did practice deceit, fraud and/or misrepresentation upon the insurance company. The total effect of the trial court's ruling was that it rescinded the policy of insurance, if any did exist, or in the alternative, set aside the policy, if any existed, on the ground of fraud.

The right to a jury trial is to be determined from the pleadings, but the Court must look at all the pleadings. The prayers of a pleading are not determinative of the right to a jury trial. In an action for a declaratory judgment the nature of the issues determines the right to a jury trial. If the issues are equitable, a jury trial may not be demanded or granted except in an advisory capacity. (Vol. 2b, Federal Practice and Procedure, pp. 36 to 39) Another test to determine whether or not the suit is equitable is that before the passage of the Declaratory Judgment Act, 28 U.S. Code, Section 2201, this suit would have been filed in equity to rescind the contract. Following the modern practice, the words of art are no longer used, but the suit seeks the same result. In the case of State Farm Mutual Auto Insurance vs. Kossey, 195 F.2d 56, the court held upon similar facts that the suit was equitable.

B. The fact that no money damages were sought in the action indicates further that the only relief sought was equitable in nature, and the only relief granted was equitable in nature. Most of the cases dealing with this point have held a jury trial should have been granted because money damages were claimed rather than equitable relief.

One example is the case of Dopinto vs. Providence Security Life, 323 F.2d 826. This was a stockholder's suit against directors alleging fraud. The stockholder also claimed that the directors were grossly negligent and sought money damages from the directors. The court said there were legal issues to be tried, i.e., gross negligence, and a jury trial should have been granted.

Schaeffer vs. Cunzburg, 246 F.2d 11, was a suit seeking a declaration of rights with respect to a partnership. The plaintiff wanted the court to establish that a partnership did exist. The court made a determination that the suit was in equity and noted that the plaintiff was not requesting money damages. On appeal it was held that the court could deny the jury demand filed by the defendants inasmuch as the suit was solely equitable. The court pointed out that no money damages were sought in this case. In the case of Simler vs. Conner, 372 U.S. 221, a client sued a lawyer to determine the lawyer's rights in a contingent fee case and the client demanded a jury. The court rules that the question was one as to the reasonableness of the fee, which was an action in law and not equitable, and that the client was entitled to a jury trial. Here again the issue was one of money.

In the case before the Court there is no prayer for money but only a determination of rights which certainly distinquishes an equitable action from a legal action, or an action in law.

C. At the time the plaintiff filed a declaratory judgment action, the defendants did not see fit to file a counterclaim. The Court of Appeals in its decision mentioned this fact several times. The reason the defendants did not file a counterclaim is that they did not have a counterclaim to file at that time. The character of many suits is changed from equity to law if and when a counterclaim is filed. In the case of Beacon Theaters Inc. vs. Westwood, 359 U.S. 500, the action initially filed was equitable in nature, declaration of rights where a possibility of an anti-trust suit existed, but a counterclaim was filed alleging anti-trust violation asking for triple damages. The court held that there were legal issues to be decided by a jury. Most of the cases are distinguishable on this one ground alone. In a case similar to the present case, a court severed the equitable and legal issues

so they could be tried separately. (U.S.F. & G. vs. Janich, 3 Fed. Rules, Decision 16). The insurance company sought a declaration of its rights. The defendant filed a counterclaim which was seeking a legal remedy and damages. The court said that the defendants were entitled to a jury trial but ordered the equitable and legal issues severed and tried separately. The court did recognize the fact that the insurance carrier's suit was one for declaration of rights and of an equitable nature.

D. At the time of the filing of the declaratory judgment action, there was no remedy at law open to the insurance carrier. The declaratory judgment action was filed October 17, 1961. At that time the personal injury lawsuit had been filed but had not been marked ready for trial. The company could filed suit to determine its rights, or do nothing except sit back and await the pleasure of its policyholder or the injured party. Counsel estimated at the time that the insurance company would have to wait until after the civil action for damages had been disposed of, various motions argued, possible appeals taken, and then possibly a period of three years before the Statute of Limitations would expire. Counsel estimates at this time it could have amounted to anything from one year to more than five years. During this time the insurance company would have to sit back, keep reserves posted, keep in touch with witnesses periodically to make sure that they did not disappear, preserve their files and others and then never quite know where it stood legally. Because of this dilemma it was decided to file a lawsuit under the Declaratory Judgment Act and have the plaintiff's rights determined in one action with finality.

Between the time that this incident came to light, sometime in September 1960 and the time this case was actually tried, December 4 and 5, 1963, (a period of three years), the following three events occurred which counsel relates here just to show the Court how great the pitfalls are when delay is encountered.

1. Dorothy M. Venell, a resident of Philadelphia and an employee of the insurance company in 1960, had charge of opening up the envelopes and processing the checks received and giving them to the cashier. Mrs. Venell

put her initials on the premium notice of the defendant Reeves, which reinstated the policy of insurance. At the time of the trial, Mrs. Vencil was no longer working for the insurance company. Counsel learned of this fact several days before the trial, and the insurance company had to urge this lady to attend the trial and appealed to her patriotic sense of justice to travel to Washington to testify.

2. Mr. Sapourn, the agent who initially sold this policy to Mr. Reeves, had a file and supposedly had in that file copies of the lapse notices and other papers. At the time of trial he could not find this file but stated he had given it to an insurance adjuster. The adjuster mentioned by Mr. Sapourn was no longer employed by the insurance company but fortunately was available locally and a subpoena was served on him, and he testified he did not remember taking the file from Mr. Sapourn's office.

3. The deposition of Mr. Paddock from the American Security & Trust Company was taken and he identified certain checks and certain bank records. At the time of the taking of the deposition, photostatic copies of the exhibits were made and attached to the deposition. At trial Mr. Paddock testified that the bank could not find the bank statements and did not have the checks. Although they might have microfilm copies of some, they had not been able to find them. Fortunately, the exhibits had been preserved in a deposition which was taken as a discovery type of deposition and was not particularly taken to preserve the testimony for trial.

A reading of the transcript in this case discloses twenty letters, checks and statements were admitted as exhibits in this case. It is reasonable to anticipate that some of these exhibits will be lost, misplaced or destroyed in the ordinary process of running a business, and that the witnesses' memories will fade as time goes on, and that some witnesses because of domestic difficulties, financial difficulties, health or otherwise, will disappear, move, or not be available for trial. This was true of the young lady who received the check from Mr. Reeves and of Mr. Sapourn, the insurance agent who had the vital conversation with Mr. Reeves after the automobile accident.

The living, breathing witness with a personality in the court room cannot be replaced by the cold words in a deposition, however helpful they might be.

The fact that several things did happen between the time the suit was filed and the time of trialiof this case clearly points out that any further delay would do further damage to the insurance company's case, whereas delay would only benefit the case of the defendants herein. It is not true that the evidence in this case was based on documentary proof. The documentary proof had to be identified and explained by witnesses.

2. THERE WAS NO LEGAL REMEDY AT LAW

The second point raised by the Court of Appeals seems to be the adequacy of the company's legal remedy. I have already touched on that above. The company had no legal remedy at the time they filed this lawsuit. It could only sit back and wait to be sued at the pleasure of the defendants. The feeling was at the time that to delay further would weaken the insurance company's case and strengthen the defendant Reeve's case, the witnesses would be lost, exhibits would be lost, and we were running an unusual risk waiting to be sued. Counsel's affidavit is attached hereto and made a part hereof to show that in his opinion there was no legal remedy at law at the time the suit was filed.

The fact there had not been a loss under the insurance policy (and could not be any until such time as the plaintiff in the personal injury action garnished the company, or until the alleged insured paid the judgment and sought indemnification from the company) gave the insurance company a perfect right to file a suit in the nature of an action for rescission of a contract or to have its rights determined.

There was no race to the courthouse door in this case, as the Appellate Court fears might happen if it followed the case of State Farm Mutual Automobile Insurance vs. Kossey, 195 F.2d 56.

The dissenting judge in the Court of Appeals has gone so far as to suggest that if there had been a right to a trial by a jury with a verdict in favor of the defendants, that in light of the record in this case the trial

judge would have been found to have granted a judgment n.o.v. for the insurance company. Therefore, the question of whether or not the plaintiff was entitled to a jury certainly would be resolved if that procedure were followed.

It is respectfully requested that the Court rule that the insurance company did not have an adequate remedy at law at the time the declaratory judgment action was filed; that any delay in presenting its case would have been prejudicial to the insurance company; that the action filed was equitable in nature; that no money damages were claimed nor were any counterclaims filed, and a judgment be entered for the plaintiff herein, pursuant to the trial memorandum filed by Judge Bazelon, and in accordance with the Court of Appeal's ruling.

[redacted], Ellis & [redacted]

[redacted] H. [redacted]
Attorneys for Plaintiff
1815 - 19th Street, N.W.
Washington, D.C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,834

MARY ALMA JAMES, DONALD E. REEVES
and MARY DONA,

Appellants,

v.

PENNSYLVANIA GENERAL INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD W. GALIHER
WILLIAM E. STEWART
WILLIAM H. CLARKE
CHARLES E. CHISHOLM
1215 19th Street, N. W.
Washington, D. C.
Attorneys for Appellee

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Did the U.S. District Court follow the instructions of the U.S. Court of Appeals for the District of Columbia Circuit in taking additional facts by affidavit and in deciding that no adequate remedy at law was available to Appellee at the time of bringing the suit for Declaratory Judgment?

II. Does an equitable action for a Declaratory Judgment that insurance coverage was procured by fraud require a jury trial as part of normal due process?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,834

MARY ALMA JAMES, DONALD E. REEVES
and MARY DONA,

Appellants,

v.

PENNSYLVANIA GENERAL INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On December 4 and December 5, 1963, an action for a Declaratory Judgment brought under 28 U.S.C. Section 2201 and Rule 57 of the Federal Rules of Civil Procedure, was brought by Appellee to establish that Appellant Reeves had mailed a falsely-dated check to the Appellee in an attempt to revive or reinstate an insurance policy after the policy

had lapsed due to nonpayment of premiums and after an accident had occurred which would lead to a claim under the policy. The District Court for the District of Columbia in Civil Action No. 3411-61 decreed that plaintiff (Appellee herein) was entitled to a Declaratory Judgment freeing the Appellee from any liability under the lapsed policy and stating that in fact no contract of insurance existed when the accident occurred.

The Appellant in this case appealed the judgment of the District Court granting the Declaratory Judgment on the grounds that while a full trial had been given on all issues presented, it was not a jury trial and a jury trial had been requested.

Upon a hearing of the appeal, this Court in No. 18537 before Chief Judge Bazelon and Circuit Judges Washington and Danaher concluded, with dissent by Judge Danaher, that an additional hearing was necessary to determine whether Appellee had an adequate legal remedy at the time this suit was filed, with the contingency of a new trial before a jury to abide the result. Judge Danaher, dissenting, concluded that:

> "In those circumstances, there was open to the insurer no adequate remedy at law if indeed the policy had been procured by fraud."

On September 23, 1965, another hearing was held by the District Court and it was determined at that hearing that the Appellee had no adequate remedy at law. In this hearing additional facts were presented to the court by affidavit of Appellee.

Now after two judges of the District Court for the District of Columbia, and a judge of the United States Court of Appeals in the District of Columbia Circuit, have determined that the Appellee had no adequate remedy at law and therefore a jury trial was not warranted in the equity action for a Declaratory Judgment, and after a full trial was had resulting in favor of the Appellee on the grounds that the Appellant Reeves had committed fraud, the Appellant now comes to this Court and requests this Court to remand the case for a retrial before a jury.

SUMMARY OF ARGUMENT

1. The District Court was instructed to inquire whether the Appellee had an adequate remedy at law at the time of filing the action for Declaratory Judgment based on fraud in obtaining insurance coverage.

The District Court accepted additional facts by affidavit, which facts were uncontested, and applied the proper legal test in concluding that no adequate remedy at law was available to Appellee and that therefore the Declaratory Judgment was an equitable action and was properly held without a jury.

2. The proceedings in an equitable action for Declaratory Judgment to establish fraud in acquiring insurance coverage do not require a jury trial inasmuch as a suit prior to the Declaratory Judgment Act would have been on the equity side of court and "fraud" is a proper subject within the jurisdiction of the equity court.

ARGUMENT

I.

Did the U.S. District Court Follow the Instructions of the U.S. Court of Appeals for the District of Columbia Circuit in Taking Additional Facts by Affidavit and in Deciding That No Adequate Remedy at Law Was Available to Appellee at the Time of Bringing the Suit for Declaratory Judgment?

The District Court followed the instructions of this Court by inquiring into the question of whether an adequate remedy at law was available to Appellee.

The nature of the hearing, as conducted by the District Court, was clearly adequate to enable that Court to make the determination required by this Court in its decision No. 18537.

Appellee presented additional facts by affidavit of Counsel which

the Court accepted. Mr. Noble, attorney for Defendant Dona, obviously realized that a correct factual presentation had been made by Counsel for the Appellee, inasmuch as he declined a continuance and expressly accepted the facts set forth in Counsel's affidavit. This is tantamount to a stipulation of facts. (J.A. "D" pages 20-21.)

In like manner, Mr. Hillman, counsel for Defendants James and Reeves, made no objection to the recitation of facts presented by Counsel verbally and in his affidavit. In addition, Mr. Hillman proffered no additional facts nor controverted any already presented. (J.A. "D" pages 22-24.)

In the affidavit submitted by Counsel for Appellee, it is stated that "one witness . . . had left the employment of the company" and that a Mr. Sapourn, the agent, could not locate his file of the matter; bank records had been destroyed and an insurance adjuster had left the company's employ. (J.A. "C" pages 2 and 3.)

These facts show that the Appellee was under the duress of time to bring the question of fraud before the Court. If the pertinent facts had not been presented by a Declaratory Judgment action, such evidentiary facts may well have disappeared forever.

The Appellee contends that this is precisely the kind of hearing that this Court had in mind, as indicated by this Court's opinion No. 18537 as follows:

> "On the other hand jurisdiction has been exercised to cancel instruments, although not negotiable, where delay and other circumstances might ultimately hinder a defense on an action at law. For instance, a right to maintain a suit in equity often arises from the fact that a defense at law in an action on an insurance policy may be lost to the insurer because of uncertainty as to the time when loss may occur, the danger that witnesses may disappear . . . ." 3 Pomeroy, "Equity Jurisprudence," 3914(a) at 590-92 (1961). (J.A. "A" pages 4 and 5.)

The question of law decided by the District Court was based upon the above facts as presented to that Court. The facts presented bring the Declaratory Judgment within the rule set forth in "Equity Jurisprudence," as stated above.

Upon the above considerations, it is clear that the District Court performed the function required by this Court and having ascertained the facts and applied the law, the Court, in effect, supported the decision of Judge Tamm that this Declaratory Judgment action required no jury, but was an equity action and that due to the fraud involved, such an equity action was the proper and only remedy available to Appellee.

II.

Does an Equitable Action for a Declaratory Judgment That Insurance Coverage Was Procured by Fraud Require a Jury Trial as Part of Normal Due Process?

An action for a Declaratory Judgment brought under 28 U.S.C., Section 2201 is governed by F.R.P.C. Rule 57 and, by reference, F.R.P.C. Rules 38 and 39.

Rule 39 states that the court has discretion to rule that the case or certain issues thereof be not heard before a jury:

> "Rule 39. Trial by Jury or by the Court. (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion *or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.*" (Emphasis added.)

The court making this ruling pursuant to Rule 39 would only be reversed if it were acting arbitrarily, capriciously or in abuse of its discretion.

The remand was due to the fact that certain evidence was not contained in the record sent to this Court. However, upon rehearing, the District Court was presented with additional facts and the court held, in effect, that the Declaratory Judgment in this case did not require a jury because it was wholly an equitable action. This holding reinforces the prior decision of the District Court and serves to satisfy the questions of this Court as to the presence of those factual matters which show that the Declaratory Judgment action was needful and proper and that an equitable remedy was desired.

This is no absolute requirement for a jury trial in an action to establish fraud in procuring insurance coverage by Declaratory Judgment.

This case was given a full hearing in Civil Action No. 3411-61 and it was determined that the Appellant Reeves had in fact committed fraud by pre-dating a premium check and misleading the Appellee into extending insurance coverage after the policy had lapsed and after an accident had occurred. (J.A. "A" page 8.)

The evidence presented at the first trial indicated that the policy lapsed as of July 24, 1960 for nonpayment of premiums, that on or about August 29, or August 30, 1960, the Appellant Reeves mailed a check to the Appellee which check was dated July 16, 1960. (J.A. "A" page 2.) On August 15, 1960, or thereabouts, an accident had occurred with Mr. Reeves' automobile, but Appellant gave no notice until September of 1960. (J.A. "A" page 9.)

Prior to the Declaratory Judgment Act, 28 U.S.C., Section 2201, this type of suit would have been filed on the equity side to rescind a contract.

If the Appellant had interjected a legal question as a counterclaim,

such as a claim for money, then a legal approach might have been warranted with a jury trial a necessary inclusion. *Beacon Theatres, Inc. v. Westwood,* 359 U.S. 500.

No such counterclaim was made by Appellant. Therefore, this case is wholly equitable in the same manner as a civil rights case is found to be wholly equitable.

This Court has considered this case on its substantive merits and has rendered its opinion wherein the question of fraud was considered. This question is answered in full measure by this Court in its opinion by the following statement:

> "On this appeal we reject Appellants' contentions that they proved a valid renewal of the insured's policy as a matter of law, and alternatively, that the Company waived any right to object to the renewal's validity. Nor can we accept their contention that by originally undertaking defense of the lawsuit arising out of the accident, the Company estopped itself from later denying coverage. In the absence of a showing of prejudice by appellants, the Company's prompt notification to the insured that it was defending the lawsuit without prejudice to a later denial of coverage was sufficient to prevent estoppel." See, *Fisher v. Firemen's Fund Indemnity Company,* 244 F.2d 194, 196 (10th Cir. 1957). (J.A. "A" page 3.)

Inasmuch as the District Court has complied with this Court's mandate to determine that there was not an adequate remedy at law available to Appellee, it may not be necessary to consider whether the above decision of this Court would change upon the granting of a jury trial, or indeed, whether this Court's opinion would have been changed in this respect had the facts been accumulated before a jury rather than, as they were, before a learned member of the District Court.

The order of the District Court acting under the instructions of this

Court found not only that the Appellee had no adequate remedy at law and that the relief sought was wholly equitable, but also found that delay in presenting the defense of fraud would be prejudicial to the Appellee. (J.A. "B".) In this context, this Court is requested to consider the prejudice to the Appellee if still another trial should be required and Appellee's witnesses were not to be found.

This case has been before the District Court on two occasions and will have been before this Court on two occasions. In none of these actions has the irrefutable factor been negated, that factor is the "fraud" perpetrated by Appellant Reeves.

The existence of the "fraud" issue as the sole issue in the action relegates this Declaratory Judgment action an equitable action and the facts show that both District Court decisions are correct in determining that an equity action without a jury was the proper recourse.

CONCLUSION

1. The Appellants have misconstrued their remedy in that if their contentions prevail, they would be entitled to a new hearing before the District Court and not to a jury trial on the issue of fraud already decided by the District Court and reviewed by this Court.

2. The District Court has, in fact, followed the instructions of this Court by accepting the additional facts by affidavit without objection by Appellants, and by ruling on the question of whether an adequate legal

remedy was available to the Appellee such as would allow the Appellee to bring out the "fraud" involved in the obtaining of insurance coverage. The District Court found that no adequate legal remedy was available and that the Appellee would have been prejudiced.

Therefore, the decision of the District Court in this matter should be affirmed.

Respectfully submitted,

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